Supreme Court, U.S.
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No. ___

IN THE

Supreme Court Of The United States

NINA L. J. JACKIM,

Petitioner,

v.

CITY OF BROOKLYN, *et al*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the preclusive measures in the holdings of the United States Supreme Court can be invoked by lower courts if one or more of the fundamental assumptions of jurisprudence are absent, thereby putting common law into conflict with Constitutional law relating to the protected rights of citizens.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner, Nina L. J. Jackim, and the Respondents; the City of Brooklyn, Ohio; City of Brooklyn Police Department; Officer Danny Meadows of the City of Brooklyn Police Department; Officer John Albany of the City of Brooklyn Police Department; John Doe; John Doe II.

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OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported Jackim v. City of Brooklyn, et al., No. 08-4701, Slip Op. (6th Cir., May 25, 2010) and appears in the appendix hereto. The Petitioner is appealing only her case of the cases consolidated by that court.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory processes for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The Petitioner asserts that the preclusive measures in United States Supreme Court holdings cannot be invoked when core principles of American jurisprudence and Constitutional law have been violated

The Petitioner asserts that the holdings of the United States Supreme Court are built upon a foundation based on common law and the Constitution. Because of this, there are certain inherent principles that are so fundamental that they are assumed to exist in the context of the Court's holdings. Some of these fundamental assumptions are that:

- The proceedings in lower state and federal courts are regular
- The actions of law enforcement are in "good faith"
- The lawyers representing the state are acting in "good faith"
- The states and their political subdivisions are not acting with deliberate indifference

The Petitioner asserts that the holdings of the United States Supreme Court are currently being used in concert as part of a blueprint to avoid civil

liability in cases where a citizen's basic civil rights have been violated – especially in cases involving alleged police misconduct. That when civil liability becomes an issue, citizens are being denied their civil rights using a game plan based on a strict "letter of the law" interpretation of Supreme Court holdings – with complete disregard for the circumstances or the inherent legal principles upon which these holding are based.

The Petitioner asserts that lower state and federal courts abuse the holdings of the United States Supreme Court by not addressing the inherent legal principles assumed to exist. That lower state and federal courts use the holdings of this Court to excuse abuse and injustice in civil liability cases, including but not limited to § 1983 cases.

The Petitioner asserts that lower state and federal courts that do not acknowledge or address the inherent legal principles upon which precedent is based are not exercising their judicial independence but are actually abusing judicial discretion.

The Petitioner asserts that the Fourth and Sixth Amendments to the Constitution, directly or by and through the Fourteenth Amendment, are under direct attack whenever a real or perceived "threat of civil liability" presents itself.

The Petitioner asserts that the preclusive measures in the holdings of the United States Supreme Court cannot be invoked if one or more of the fundamental assumptions listed above are found to exist because that would put common law into conflict with Constitutional law relating to the protected rights of citizens.

The strict interpretations of the following United States Supreme Court cases are at the forefront of the abuse:

- *Heck v. Humphrey*, 512 U.S. 477 (1994) reaffirmed by *Wallace v. Kato*, 549 U.S. 1362 (2007)
- *North Carolina v. Alford*, 400 U.S. 25 (1970)

The Petitioner asserts that an *Alford* plea is not a guilty plea when the prosecution fails to comply with Criminal Rule 16, the criminal defendant consistently professes their innocence, and the proceedings of the trial court fail to conform to black letter laws implemented to ensure that the *Alford* proceedings do not violate a criminal defendants Sixth Amendment protections. *North Carolina v. Alford*, *supra*.

The Petitioner asserts that *Heck* and *Wallace* cannot bar recovery in cases where the lower courts are either unwilling or unable to enforce Criminal

Rule 16 or black letter laws implemented to protect a criminal defendant's Sixth Amendment rights. *Heck v. Humphrey, supra; Wallace v. Kato, supra.*

The Petitioner asserts that the remedies to the *Heck* bar, reaffirmed by *Wallace*, as identified by this Court are already under attack by lower federal courts and state courts in order to dismiss cases before the remedy can be perfected. *Heck v. Humphrey, supra; Wallace v. Kato, supra.*

The Petitioner asserts that the United States Supreme Court must send this case back to the Sixth Circuit Court of Appeals to address their reinterpretation of provisions of *Heck* and *Wallace* relating to dismissal prior to exhaustion of *Heck* remedies.

The Petitioner asserts that should a § 1983 case still merit dismissal, that the court should make of record in their opinion any "bad faith" acts of the police and prosecutor, irregularities of the lower court proceedings, and deliberate indifference on the part of the political subdivision because problems hidden from the public view are seldom corrected.

REASONS FOR ALLOWANCE OF THE WRIT

The Untied States Supreme Court's "principal responsibility" and "primary basis" for reviewing state-court decisions "is to ensure the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

This writ must be allowed to restore the integrity and uniformity of federal law in states where the lower state and even federal courts are, at best, not furthering the law or, at worst, undermining public confidence in the law by validating "bad faith" acts by the police and prosecutors, ignoring court proceedings that do not conform to black letter laws, and excusing deliberate indifference by states and their political subdivisions.

This writ must be allowed to restore the integrity and uniformity of federal law in states where the highest state court is not able to implement or enforce the Rules of Court. For example, in the state where the Petitioner resides, the highest state court had to get legislative approval in order to be able to implement and enforce Criminal Rule 16 – in 2010. This came about only after a group of Common Pleas judges in Cuyahoga County staged a judicial revolt in 2007 when they became concerned that innocent people were being convicted. As a result, Criminal Rule 16 was implemented in the Cuyahoga County

Common Pleas Court in 2009. Until Criminal Rule 16 is fully implemented and enforced, criminal defendants, including those represented by counsel, will find themselves in court on the day of trial without any criminal discovery. This is the motivation for many to accept an *Alford* plea. When the system is aligned against you and disregards your Sixth Amendments rights, a minor misdemeanor conviction is better than six months in jail. *North Carolina v. Alford, supra.*

This writ must be allowed in order to stop victims and witnesses of police misconduct from being arrested, prosecuted, and convicted in order to secure a conviction that would bar civil recovery against the offending officer(s) or the political subdivision. This is a perversion of law that undermines the rule of law and public confidence in the police and justice system.

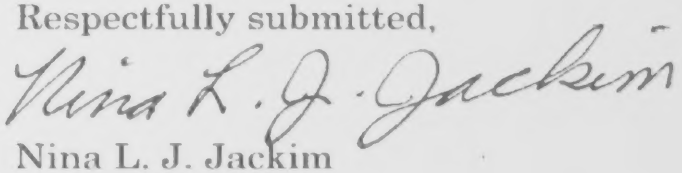
A recent example: Last winter there was a single car accident. One brother wandered away from the accident and the other was found in the car. A search for the missing brother was not initiated and his body was later recovered in a nearby creek. This summer the family filed a civil suit against the police. The immediate response by the police was to arrest the surviving brother. It is an ingrained response that reveals a customary practice.

This writ must be allowed in order to establish that the Madisonian concept of due process was based on the premise that the necessary but coercive power of the police must be kept in check by the courts. Every judge must be alert to the need for government to control government. Bruce W. Burton, *The "O.K. Corral Principle": Finding the Proper Role for Judicial Notice in Police Misconduct Matters*, Spring 1999, New Mexico Law Review, pp. 3-5

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,



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APPENDIX

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Appendix A –Mandate of the United States Court of Appeals for the Sixth Circuit

Dated June 16, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 08-4701 /07-3514

Filed: June 16, 2010

BRUCE JACKIM; NINA L.J. JACKIM

Plaintiffs-Appellants

v. 1:05CV1678 SL

CITY OF BROOKLYN; CITY OF BROOKLYN POLICE DEPARTMENT; SAM'S EAST, INC., dba Sam's Club; WAL MART STORES EAST, INC., dba Sam's Club; JANE DOE; DAN MEADOWS; J. ALBANY; JOHN DOE; JOHN DOE II

Defendant - Appellees

MANDATE

Pursuant to the court's disposition that was filed 05/25/2010 the mandate for these cases hereby issues today. Affirmed.

COSTS: WITH NO COST

APPENDIX A

Appendix B –Slip Opinion of the United States Court of Appeals for the Sixth Circuit

Dated and Decided May 25, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-3514; 08-4701

Filed: May 25, 2010 Leonard Green, Clerk

BRUCE JACKIM and NINA L.J. JACKIM
Plaintiffs-Appellants (07-3514),

v.

SAM'S EAST, INC, and WAL MART STORES EAST, INC

Defendants-Appellees.

NINA L.J. JACKIM,
Plaintiff-Appellant (08-4701),

v.

CITY OF BROOKYLN, CITY OF BROOKLYN POLICE DEPARTMENT, SAM'S EAST, INC., WAL MART STORES EAST, INC., JANE DOE, DAN MEADOWS, J. ALBANY, JOHN DOE, and JOHN DOE, II,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION
No. 1:05-cv-01678 – Sara Lioi, Judge.

Argued: April 23, 2010, Decided: May 25, 2010

BEFORE: KENNEDY, COLE, Circuit Judges, and JORDAN*, District Judge.

KENNEDY, Circuit Judge. Plaintiffs appeal the district court's grant of partial summary judgment against them in their claim for damages arising out of their arrest for disorderly conduct.

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*The Honorable Robert Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Because the district court properly concluded that one plaintiff's claim for unreasonable seizure was barred because she pleaded no contest to the charges against her, and because there was no evidence that the retail establishment participated in a conspiracy to deprive plaintiffs of their right to a fair trial, we **AFFIRM**.

FACTUAL AND PROCEDURAL BACKGROUND

On May 25, 2003, plaintiffs Bruce and Nina Jackim were shopping at a Sam's Club retail store in Brooklyn, Ohio. As they attempted to check out, a dispute arose over whether they were required to

pay taxes on their purchase. Unable to resolve the matter with the cashier, they proceeded to the membership desk. At the membership desk, they began to argue with the customer service representative.

Dan Meadows, who is also employed as a police officer for the Brooklyn Police Department, was working for Sam's Club as a security guard on this afternoon. He came over to the Jackims, and asked for Mr. Jackim's identification. According to Meadows, Mr. Jackim refused to provide it, so Meadows placed Mr. Jackim under arrest for disorderly conduct and obstructing official business. When Meadows attempted to handcuff Mr. Jackim, a struggle ensued and both men fell to the floor. Two other officers - John Albany and Mike Mackovjack- assisted in subduing Mr. Jackim. During the struggle, Mrs. Jackim "tr[ied] to climb and grab into the middle of the group during the handcuffing of Mr. Jackim." She also was arrested.

Plaintiffs' version differs. Mr. Jackim testified that "without warning or provocation or any cause whatsoever, [Meadows] suddenly abruptly jumped up to the counter to within 18 inches of my face from having been several feet back, and shouts at me" According to Mr. Jackim, Meadows then threatened to arrest Mr. Jackim if he did not provide his identification. Mr. Jackim reached into

his wallet to hand Meadows his identification, when Meadows placed a handcuff on his wrist. Meadows then slapped Mr. Jackim, and then "body slammed [Mr. Jackim] into the counter." *(Id.* at

105.)

Both plaintiffs were charged with disorderly conduct and resisting arrest in Parma Municipal Court. In preparation for their criminal trial, plaintiffs subpoenaed a video recording of the incident captured by Sam's Club's security cameras, and received it on June 2, 2003. However, the timestamp on the video was delayed by twelve hours, and plaintiffs lacked equipment to view the videotape. Plaintiffs issued three additional subpoenas to Sam's Club employees. Each was returned marked "NOT FOUND IN MY COUNTY" by the deputy who attempted service. Apparently plaintiffs did not pursue the matter further with the state courts at this time.

On February 23, 2004, Mrs. Jackim pleaded no contest to attempted disorderly conduct, a misdemeanor. She was fined $75, which she paid. Mr. Jackim proceeded to trial, and was found guilty. However, he successfully argued on appeal that the trial court erred by excluding evidence of the video recording. He was again tried, and again found guilty. There is no indication that either plaintiffs' convictions have been overturned or otherwise invalidated. Mrs. Jackim has requested a pardon from the Ohio governor.

On May 25, 2005, plaintiffs filed suit in the Cuyahoga County Court of Common Pleas, and defendants removed the matter to federal district court. In their amended complaint, plaintiffs allege deprivation of equal protection, unreasonable seizure/excessive force, conspiracy, in violation of 42 U.S.C. § 1983, and state law claims for reckless infliction of emotional distress and negligence.

Named as defendants are the City of Brooklyn, the City of Brooklyn Police Department, officer

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Meadows, officer Albany, and several John and Jane Doe police officers (collectively the "Brooklyn Defendants"). Also named as defendants are Sam's Club and Walmart.

Plaintiffs retained Tex Bynum as a video expert to assist them with viewing the security camera footage. (R. 83.) Defendants requested copies of the video tapes, and Mr. Bynum purported to produce a number of "fair duplicates." The parties then met at a Sam's Club location on June 14, 2006, to review the tape. While plaintiffs' copy worked, the duplicates provided to defendants did not. Unable to resolve who should be given access to which tape, the parties asked for the district court's involvement, in an order dated July 18, 2006, the district court ordered plaintiffs to lodge their tape with the court, and each side submit proposals for allowing fair access to the tape. Plaintiffs submitted their copy to chambers (although not within the time parameters set by the court). After reviewing the proposals, the district court decided that it should retain custody of the tape, but would allow experts for each side thirty days to have access to the tape, provided they first signed an affidavit agreeing not to alter the tape. Plaintiffs' expert received the tape first, and produced a DVD version that was submitted to the district court as an exhibit to an "addendum affidavit" purporting to supplement an expert report that he had previously filed.

The balance of the litigation consisted of a

number of procedural missteps by the plaintiffs. As discussed below, these missteps did nothing to help their case. First, plaintiffs filed an offensive motion for summary judgment, and almost three months later, filed a supplement to this motion. Finding that factual issues precluded summary judgment in favor of plaintiffs, the district court denied the motion, and plaintiffs do not challenge this on appeal. In response to the plaintiffs' motion, the Brooklyn Defendants filed a response and their own motion for summary judgment. The Brooklyn Defendants argued that plaintiffs claims were barred by *Heck v. Humphrey*, 512 U.S. 477

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(1994), collateral estoppel, or lack of evidence. Sam's Club also filed a response and cross-motion for summary judgment, raising similar arguments. Plaintiffs responded, but did not address the arguments raised[1]

Sam's Club then filed another motion for

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[1] The only part of plaintiff's response that can even arguably be construed as responsive to the defendants' motion is the following:

> The Defendants also filed a Motion for Summary Judgment in this case. There is no record of a suit that is pending against the Plaintiffs in this court. The only litigation which is on record is between the parties in the instant case filed against the Defendants by the Plaintiffs. In this case, Defendants are in a defensive posture in opposition to Plaintiffs' civil rights claims. The Defendants have not invoked the jurisdiction of this court to litigate and to judicially resolve a certain claim against the Plaintiffs.

summary judgment, contending that it was not a state actor and therefore may not be sued under section 1983. Plaintiffs responded to this motion, arguing that there was a civil conspiracy based on Sam's Club's refusal to comply with a subpoena and the state trial court's initial ruling to exclude evidence of the videotape.

The district court granted defendants motions in part, holding:

> (1) All claims asserted by Nina Jackim pursuant to § 1983 against the Brooklyn Defendants must be dismissed, either because they are barred by her criminal conviction or there is nothing in the record to support their continued assertion (unreasonable seizure, excessive force, equal protection and/or conspiracy); (2) the equal protection claim asserted by Bruce Jackim against the Brooklyn Defendants must be dismissed because there is no evidence (or even allegations) in the record to support it; (3) the conspiracy claim asserted by Bruce Jackim against the Brooklyn Defendants must be dismissed to the extent (but only to the extent) it is premised on either an alleged equal protection violation or his claim of excess force, again because there is nothing in the record to support such a claim; (4) Bruce Jackim's Monell and respondeat superior claims asserted pursuant to § 1983 against the City of Brooklyn are inadequate as a matter of law and must be dismissed; (5) all claims against

> Sam's Club pursuant to § 1983, by either Plaintiff, must be dismissed due to the absence of state action; (6) all state law claims by both Plaintiffs against Sam's
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>
> Club should be dismissed due to a lack of an independent basis for this Court to continue to assert jurisdiction over those claims

All claims by Mrs. Jackim were dismissed, as were all claims by either party against Sam's Club. The district court also found that Mr. Jackim was likely to be barred by the *Heck* doctrine, but held the case in abeyance to allow him to challenge his conviction. Finding "no just reason for delay," Fed. R. Civ. P. 54(b), the district court certified a partial final judgment. Plaintiffs filed a notice of appeal, assigned case number 07-3514.

Meanwhile, the case was reassigned to a different district judge. Plaintiffs filed a motion to amend judgment, arguing that the district court erred in relying on Mrs. Jackim's state court conviction because it was a "void judgment." The district court denied this motion. Plaintiffs filed a second notice of appeal, assigned case number 08-4701. Both appeals were consolidated for our resolution.

Plaintiffs challenge only three aspects of the district court's ruling, in appeal 07-3514, plaintiffs argue that the district court ignored the "best evidence rule," and should not have granted summary judgment to Sam's Club on the basis that it was not a state actor and cannot be sued under

section 1983. Appeal 08-4701 concerns only Mrs. Jackim, and involves a challenge to the district court's application of collateral estoppel to her lawsuit.

STANDARD OF REVIEW

"This court reviews a district court's order granting summary judgment de novo." *Havensure, L.L.C. v. Prudential Ins. Co. Of America,* 595 F.3d 312,315 (6th Cir. 2010) (quoting *Cincom Sys., Inc. v. Novelis Corp.,* 581 F.3d431,435 (6th Cir. 2009)). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317,322 (1986). "In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Jones v. Potter,* 488 F.3d 397, 402-03 (6th Cir. 2007) *(citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)).

DISCUSSION

I. Appeal 08-4701

Plaintiff Mrs. Jackim challenges the district court's conclusion that her conviction on her plea of no contest collaterally estops her from pursuing her claim for unlawful seizure based on her arrest and

that there was no basis on which it could overturn plaintiff's criminal conviction.[2] The district court also concluded that she had not proven an excessive force claim, found that she had made no factual allegations to support her equal protection claim argument, and declined to exercise supplemental jurisdiction over the state law claims. Plaintiff does not challenge these aspects of the decision in her appeal.

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Plaintiff asserts that her arrest was made without probable cause, and therefore it violated the Fourth Amendment. She cannot challenge the officer's probable cause that she committed a crime because she conceded that fact when she pleaded no contest. "As a general rule, a federal civil action

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[2]Plaintiff inexplicably spends her entire brief arguing that the district court improperly found her claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). She concedes that *Heck* applies to her case, but should not bar her suit, because she retains hope of vacating her conviction. This concession was ill-advised. This court has held that *Heck's* bar does not apply when habeas relief is unavailable because the plaintiff is sentenced to a non-custodial sentence. *Powers v. Hamilton County Public Defender Com'n*, 501 F.3d 592, 603 (6th Cir. 2007). However, it does not matter here because the district court did not rely on *Heck* when entering judgment against plaintiff. Instead, in a footnote, while noting *Heck's* application, the district court held that "the collateral estoppel bar is sufficient standing alone to justify judgment in favor of Defendants on Mrs. Jackim's claims." (R. 126, at 26n.21.) The failure of plaintiff to challenge the basis for the court's judgment is sufficient for us to affirm. *See, e.g., Pagan v. Fruchey*, 492 F.3d 766, 768 n.1 (6th Cir. 2007) (en banc) ("It is well established that issues not raised by an appellant in its opening brief... are deemed waived." (quotations omitted)).

brought under § 1983 is not a venue for re-litigating issues that were decided in a prior state criminal case." *McKinley v. City of Mansfield,* 404 F.3d 418,428 (6th Cir. 2005) (citing *Allen v. McCurry,* 449 U.S. 90, 103-105 (1980)). This court has interpreted Ohio law to bar litigation of a false imprisonment claim under indistinguishable circumstances. In *Walker v. Schaeffer,* 854 F.2d 138 (6th Cir. 1998), two plaintiffs were arrested for disorderly conduct. Like the plaintiffs here, they pleaded no contest in Ohio state court. The *Walker* plaintiffs appealed their convictions within the state court, and also filed a section 1983 lawsuit in federal court alleging that the officers had arrested them without probable cause and wrongfully imprisoned them. This court held that the plaintiffs were estopped from challenging the probable cause of their detention, which was fatal to their lawsuit for false arrest and imprisonment. The district court correctly held that *Walker* compels the same result here.

Notably, plaintiff does not contend on appeal that the district court erred in relying on *Walker.* Instead, in her reply brief, plaintiff does argue that preclusive effect should not be given to the state court judgments here because the proceedings were unfair. She states that the "municipal court proceedings were patently unfair and void on the face of the record where Prosecutor Goldberg did not comply with Rule 16 of the Ohio Rules of Criminal Procedure by failing to respond to *Request for Bill of Particulars* and *Request for Discovery* and pursued a plea on the nonexistent charge of 'attempted disorderly conduct.'"

First of all, she waived this argument by not making it in her opening brief. *See, e.g., United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993) ("Issues raised for the first time in a reply brief are not properly before this court."). More significantly, this argument is without merit. It is true that if a plaintiff is deprived of a "'full and fair opportunity' to litigate [an] issue in the earlier case," courts will not extend preclusive effect to the earlier decision. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). However, "[t]here has been no indication that in state court plaintiff[], then represented by counsel, did not have a reasonable and fair opportunity to litigate [her] contentions that defendants violated [her] constitutional or lawful rights under the circumstances of [her] arrest and detention." *Walker*, 854 F.2d at 143. Plaintiff does not explain what discovery was withheld from her, or how she was prejudiced by the prosecutor's reluctance to provide a bill of particulars. In any event, when she chose to plead no contest rather than litigate, she relinquished her right to challenge procedural irregularities in her prosecution. *See, e.g., Foutty v. Maxwell*, 174 Ohio St. 35, 38-39, 186 N.E.2d 623, 626 (1962) ("An accused by pleading guilty to an indictment waives the right to a bill of particulars."). Plaintiff had the option of insisting upon a trial where her acquittal would have cleared the way for this lawsuit. She chose to forgo her opportunity to litigate it by pleading no contest, and is precluded from taking a different position in this forum.

Perhaps plaintiff contends that the district

court' s ruling was premature because there are still avenues for her to challenge her conviction. However, other than a passing reference in a reply brief to an "application for executive clemency with the Ohio Parole Board," she fails to explain what avenues these are, and failed to present this argument to the district court. Plaintiff points to no precedent for the proposition that district courts must delay adjudication of their claims whenever there is some theoretical possibility - however remote - that their conviction may be overturned.

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Contra Walker, 854 F.2d at 143 (finding claims barred after a no contest plea under Ohio law even though plaintiffs had appealed their convictions and there was no indication whether the appellate process had been completed). The district court properly dismissed plaintiff's claim for unreasonable seizure.

Finally, plaintiff asserts that the district court judges involved in her case were biased. Plaintiff's argument is without merit. We affirm the district court's dismissal of her claims.

II. Appeal 07-3514

Both plaintiffs appeal the district court's conclusion that Sam's Club is not liable under section 1983 because it is not a "state actor." Because we affirm the district court' s holding that Mrs. Jackim is collaterally estopped from pursuing her lawsuit here, the outcome of this appeal matters only for Mr. Jackim.[3] Plaintiffs raise two

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[3] The district court stayed proceedings as to Mr. Jackim's claim against the Brooklyn defendants pending Mr. Jackim's

challenges to the district court's dismissal of their lawsuit against the Sam's Club defendants: the district court overlooked plaintiffs' evidence indicating a conspiracy between the Sam's Club defendants and state actors, and the district court failed to apply the "best evidence" rule. Both arguments are without merit.[4]

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The more substantial argument of the two is plaintiffs' contention that there was sufficient evidence showing a conspiracy between Sam's Club and the Brooklyn defendants, so Sam's Club may be liable under section 1983. "A private party's actions constitute state action under section 1983 where those actions may be 'fairly attributable to the state.'" *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (en banc) (quoting *Lugar v.*

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appeal of his conviction. No one has challenged this course of action on appeal.

[4]During oral argument, plaintiffs advanced a new argument that they should have been permitted to amend their complaint. To begin, they never raised this argument in their briefing, and therefore have waived it. *See United States ex. rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 450 n. 6 (6th Cir. 2008). Moreover, the district court's grant of summary judgment remains proper, regardless of what the complaint would have said, because plaintiffs never provided evidence supporting their allegations in response to defendants' motions for summary judgment. *See Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 500 n. 1 (6th Cir. 2007) ("Unless [plaintiff] can establish grounds upon which to reverse the district court's grant of summary judgment.., her challenge to the court's failure to rule on her motion to amend, even if successful, would not change the disposition of this action.").

Edmondson Oil Co., 457 U.S. 922, 947 (1982)). "The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test." *Id.* (citing *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992)).

This court has also held that "a private party has conspired with state officials to violate constitutional rights, then that party qualifies as a state actor and may be held liable pursuant to § 1983." *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir. 2000).

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis, 361 F.3d 898, 905 (6th Cir. 2004) (quotations omitted). However, "'[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such

a claim under § 1983.'" *Moldowan v. City of Warren,* 578 F.3d 351,395 (6th Cir. 2009) (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1538 (6th Cir. 1987)).

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Plaintiffs' response to Sam's Club's motion for summary judgment raised this argument, but they did not attach any evidence to their response, nor did they point to evidence in the record that support their claims. This by itself could be fatal to their claims. We have emphasized time and again "that there is no duty imposed upon the trial court to 'search the entire record to establish that it is bereft of a genuine issue of material fact.'" *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 407, 410 (6th Cir. 1992) (quoting *Street v. d.C. Bradford & Co.,* 886 F.2d 1472, 1480 (6th Cir. 1989)). Here, plaintiffs bore the burden of proof at trial. All the defendants had to do was "point[] out to the district court []that there is an absence of evidence to support the nonmoving party's case" to impose a duty on plaintiffs to respond. *Celotex,* 477 U.S. at 325. Once defendants fulfilled this burden, "[t]he non-moving party may not rest upon its mere allegations or denials of the adverse party's pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial." *White v. Baxter Healthcare Corp.,* 533 F.3d 381,390 (6th Cir. 2008) *(citing Matsushita Elco. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)). Plaintiffs' response to Sam's Club's motion was devoid of references to the record, which makes it

wholly insufficient to meet their burden.[5]

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What plaintiffs did do was to assert that the following showed a "single plan" between the defendants:

> [T]he surveillance tape was delivered to Counsel for Plaintiffs by Sam's Club in compliance with a subpoena, that the duly qualified expert opined that the surveillance tape had been tampered with, that the trial court denied admission of the tape into evidence at the request of the Prosecutor, that the Plaintiffs and their tape expert were prohibited by the court from testifying about the tape and reprimanded for mentioning that a surveillance tape existed - before the jury - two subpoenas issued to Sam's Club relating to the tape were not responded to or

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[5] The conduct of plaintiffs' counsel through this litigation reveals a profound misunderstanding of the rules that govern proceedings in federal court. For example, after summary judgment was entered, plaintiffs filed a motion for reconsideration, contending that defendants erred by not introducing certain evidence and "[t]he court cannot consider the entire record if portions are not of record." Plaintiffs bore the burden of proof on their claims at trial, so it was *plaintiffs'* obligation to see that evidence supporting their claims was in the record, and *plaintiffs'* obligation to direct the district court's attention to those portions of the record supporting their claims. If there were something missing from the record, it was plaintiffs' duty to add it. When plaintiffs do not provide competent evidence to the court supporting their claims at the proper time, summary judgment is appropriate. This is the entire purpose of Rule 56.

> enforced, Defense Counsel's Motion to Compel the subpoenaed information relating to the surveillance tape was denied and ultimately the tape which contained critical exculpatory evidence of the Plaintiffs' innocence was suppressed by the trial court.

In their briefing to this court, plaintiffs again indicate that their claim of conspiracy is premised solely on suppression or tampering of evidence, and not the conduct of the officers during the arrest. ("Danny Meadows' act of police misconduct on May 25, 2003 exposed Sam's Club to civil liability under Ohio case law regardless of whether he was working as an employee of Sam's Club or as an independent contractor. To remove that civil liability, all that Sam's Club [and the City of Brooklyn] had to do was suppress exculpatory evidence and make sure that Bruce and Nina were convicted of a crime." (alteration in original)).

This allegation - devoid of any evidentiary support - falls short of creating a triable fact on Sam's Club's participation in a conspiracy to deprive plaintiffs of their constitutional rights. Of course, because "[r]arely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire,.., circumstantial evidence may provide adequate proof of conspiracy." *Weberg v. Franks,* 229 F.3d 514, 528 (6th Cir. 2000) (internal quotations omitted). Nevertheless, there still must be *some* "evidence from which to infer that the defendants acted in concert" in their unlawful acts. *Spadafore v. Gardner,* 330 F.3d 849, 854 (6th Cir. 2003). Here,

there is no evidence that Sam's Club directed the prosecutor's office or the state trial judge. *See Memphis*, 361 F.3d at 906 (finding that complaint stated a claim of conspiracy when it alleged an agreement and that the government "continuously conferred with agents of [private entities] Phillips and Pro-Tech before confronting members of the [Union]" and "that Phillips directed and conspired with the City of Memphis to direct police officers to harass, threaten and intimidate the plaintiff"). Simply cooperating with a prosecutor during a criminal case is not sufficient to show conspiracy. *See Moldowan*, 578 F.3d at 395 (holding that allegation of conspiracy between the prosecution's expert witnesses who testified falsely about defendant's dental marks and the prosecution was not sufficient, despite allegation that they "arrang[ed] for the photographing of the bite marks on Ms. Fournier and for making molds of Mr. Moldowan's and Mr. Cristini's dentition"). The logical path from plaintiffs' allegations to a conclusion that Sam's Club acted in concert with a state actor to deprive plaintiffs of their rights relies not on evidence or even a reasonable inference, but on pure fantasy. Thus, plaintiffs' claims are "insufficient to withstand a motion for summary judgment [because they]..., lack the requisite material facts and specificity necessary to sustain a conspiracy claim." *Id.* (quotations omitted, alteration in original). The district court properly found that plaintiffs failed to create a triable issue of material fact on their claims.

Citing the "best evidence rule," plaintiffs also

argue is that it was improper for the district court to reject their claim of state action by relying on "lay opinion testimony and conclusions of law by lay witnesses on subjects that call for expertise not possessed by the witnesses." As best we can tell, plaintiffs reason that the district court should not have given any weight to the affidavit of Meadows when the "best evidence" available of what transpired was the recording of the event.

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The first problem is that plaintiffs never objected to the district court's consideration of the affidavits on the basis of the "best evidence rule."[6] "If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived," unless enforcing a waiver rule would constitute a "gross miscarriage of justice." *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994) (collecting cases).[7] The more serious problem with the argument is that it completely fails to understand Rule 1002 and related rules of evidence, which are often - and confusingly -

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[6] Plaintiffs did file a motion to strike Meadows' affidavit, but did not raise any argument about the best evidence or even mention the videotape.

[7] We also note that the plaintiffs never submitted the videotape to the district court as evidence. It is true that plaintiffs lodged the tape with the district court early in the litigation, (R.81), but this was pursuant to a court order that was entered to resolve a discovery dispute. Significantly, plaintiffs never cited to or even mentioned the videotape in their briefing on the issue of summary judgment.

referred to as the "best evidence rule." *See* Fed. R. Evid. 1001, Advisory Committee Notes to 1972 Proposed Rules (noting that it is "misleading" to speak of a "best evidence" doctrine); Wright & Gold, 31 Fed. Prac.& Proc. Evid. § 7183 ("The phrase by which the subject of Article X is generally known, the best evidence doctrine, obscures the scope of Rule 1002."). The rule "is concerned only with proving the terms of a writing" or recording. *Wallin v. Greyhound Corp.*, 341 F.2d 521,523 (6th Cir. 1965) (citations omitted); *see also* Fed. R. Evid. 1002 *("To prove the content of a writing, recording, or photograph,* the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." (emphasis added)). Defendants offered evidence in the form of an affidavit of someone with personal knowledge that was germane to what transpired on May 25; the trial court

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properly considered that evidence. *See* Fed. R. Civ. P. 56(e) (providing that affidavits may be considered on summary judgment). Defendants were not trying to prove the content of a recording, but what actually occurred on the day (which also happened to be captured by videotape as well as viewed by other witnesses). Meadows' knowledge of the day did not come from the video, but his own senses and memory. The fact that a video recording may at times be in fact the "best" evidence of what occurred does not render first-hand testimony of the event incompetent. *See O 'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567,598-99 (6th Cir. 2009) (holding that best evidence rule did not

prohibit trial court's consideration of a plaintiff's testimony recalling when he reported to work, even though written work schedules existed).[8] Plaintiffs' arguments are without merit, and the district court properly granted judgment in favor of Sam's Club.

CONCLUSION

Finding no merit to plaintiffs' arguments, we **AFFIRM**.

APPENDIX B

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[8]One treatise helpfully explains:

> For example, assume a witness to a bank robbery testifies that he saw the defendant commit the crime. This testimony raises no issue under Rule 1002 even if the contents of a bank surveillance photo reveal the same fact, the witness signed a written statement describing what he saw, and a recording was made of defendant planning the robbery .... In sum, any witness with knowledge of facts that exist independent of the contents of a writing, recording, or photograph may testify without raising an issue under Rule 1002.

Wright & Gold, 31 Fed. Prac. & Proc. Evid. § 7184

Appendix C – Judgment Entry of the United States District Court, Northern District of Ohio, Eastern Division

Dated November 14, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRUCE A. JACKIM, et al.,	)	CASE NO. 1:05CV1678
PLAINTIFFS,	)	JUDGE SARA LIOI
VS.	)	
	)	JUDGMENT ENTRY
CITY OF BROOKLYN, et al.,	)	
DEFENDANTS.	)	

For the reasons set forth in the Court's Memorandum Opinions, Document Nos. 126, 144, and 163, all claims asserted by plaintiff Nina Jackim are hereby DISMISSED. Pursuant to Fed. R. Civ. P. 54, all of the claims asserted by Nina Jackim having been fully resolved, the Court finds there is no just reason for delay as to such claims.

IT 1S SO ORDERED.
Dated: November 14, 2008
/s/ Sara Lioi
HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

APPENDIX C

Appendix D – Opinion and Order of the United States District Court, Northern District of Ohio, Eastern Division Dated November 14, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRUCE A. JACK1M, et al., PLAINTIFFS,	) CASE NO.1:05CV1678
VS.	) JUDGE SARA L1Ol
	) OPINION AND ORDER
CITY OF BROOKLYN, et al., DEFENDANTS.	)

I.

BACKGROUND

This matter is before the Court on the motion of plaintiff Nina Jackim styled "Motion for Reconsideration of Memorandum Opinion Dismissing Nina Lynn Jackim and Sam's Club." (Doc. No. 145.) Defendants Sam's East, Inc. ("Sam's Club"), City of Brooklyn, Officer Dan Meadows and Officer John Albany ("Brooklyn defendants") have filed a joint brief in opposition, and plaintiff Nina Jackim has filed a reply. (Doc. Nos. 148 and 151, respectively.)

Nina Jackim and her husband Bruce Jackim brought this civil rights action in response to the unlawful treatment they allege they received during the course of a shopping trip to an area Sam's Club store. The details relating to the incident in the store, including the resulting arrests of Nina and Bruce Jackim, have been set forth in prior decisions, familiarity with which is presumed.
1

On March 22, 2007, Judge Kathleen M. O'Malley[1] filed a Memorandum Opinion resolving the parties' summary judgment motions. The Court dismissed all claims asserted by Nina Jackim. With respect to the federal civil rights claims, the Court found that Nina's conviction for attempted disorderly conduct constituted a bar under *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court determined that Bruce Jackim's convictions for assault on a police officer and resisting arrest also served as a bar to his federal claims. The Court stayed the action as to these claims, however, upon evidence that Bruce's convictions had been reversed and he had been granted a new criminal trial.[2] *See Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091 (2007). Finally, the Court dismissed Sam's Club, finding that it was not a state actor.

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[1] Judge O'Malley transferred this case to the docket of the honorable Sara Lioi on March 23, 2007.

[2] The Court has since been informed that, upon retrial, Bruce was convicted on both counts on October 28, 2008. His time for seeking a direct appeal, however, has not yet expired. (*See* Doc. No. 157)

Nina and Bruce Jackim each filed motions to alter or amend the Court's ruling on summary judgment. (Doc. Nos. 128 and 129.) Both plaintiffs challenged the dismissal of Sam's Club. Nina Jackim also attacked the Court's determination that her conviction upon her "no contest" plea served as a bar to her federal claims. Specifically, she argued for the first time that her conviction was void because the prosecutor in her state criminal trial failed to timely respond to her request for a bill of particulars.

This Court denied both motions in a decision dated November 2, 2007. In so ruling, the Court found no evidence that Sam's Club exercised any power reserved to law enforcement authorities. The Court also rejected Nina's impermissible collateral attack upon her state criminal conviction.

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On November 10, 2007, Nina filed the present motion for reconsideration.[3] While it is unclear whether Nina is seeking review of the Court's November 2, 2007 ruling on her motion to alter or amend, or seeking further review of Judge O'Malley's ruling on summary judgment, as she alternates in her attack between the two decisions, the Court shall presume that she seeks relief from the Court's more recent ruling.[4]

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[3] The Court was prepared to file this Opinion and Order when plaintiffs filed their motion for recusal, and, thus, delayed the filing of this decision.

[4] Federal Rules of Civil Procedure 59(e) provides that a party may seek reconsideration of a judgment within 10 days of the entry of judgment. Any attack upon the decision on summary judgment at this juncture would be untimely.

II.

STANDARD OF REVIEW

It has been observed that:

> Although "motions to reconsider are not ill-founded step-children of the federal court's procedural arsenal," they are "extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged." *In re August, 1993 Regular Grand Jury*, 854 F. Supp. 1403, 1406 (S.D. Ind. 1994). To be sure "a court can always take a second look" at a prior decision; but "it need not and should not do so in the vast majority of instances," especially where such motions "merely restyle or re-hash the initial issues." *Id.* at 1407. It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or "to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue." *Id.* at 1408. Where [...] "defendant views the law in a light contrary to that of this Court," its "proper recourse" is not by way of a motion for reconsideration "but appeal to the Sixth Circuit." *Dana Corp. v. United States*, 764 F. Supp. 482, 489 (N.D. Ohio 1991).

McConOcha v. Blue Cross & Blue ShieM Mut., 930

F. Supp. 1182, 1184 (N.D. Ohio 1996).

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The three major grounds justifying reconsideration of a court's orders are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Reich v. Hall Holding Co.*, 990 F. Supp. 955, 965 (N.D. Ohio 1998) (citing *Petition of United States Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973)). The motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior holding. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not substitutes for appeals nor are they vehicles whereby a party may present arguments inexcusably omitted in prior proceedings or re-hash arguments that have already been rejected by the court. *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991). *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

III.
DISCUSSION

A. Nina Jackim's Federal Claims are Barred by Heck

As she did in her prior motion to alter or amend, Nina once again invites the Court to declare her conviction for attempted disorderly conduct void so that she may escape the preclusive effect of the *Heck* bar. This time, however, instead

of focusing on the lack of a bill of particulars, Nina takes a slightly different tack and argues that the crime of attempted disorderly conduct is not cognizable under state law. Further, Nina maintains that the Court misunderstood the issue of the validity of her underlying conviction when it ruled on her motion to alter or amend. Nina explains: "It is not that the 'no contest' plea acts as a bar, it is not that a conviction acts as a bar, it is whether a

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conviction for *attempted disorderly conduct* acts as a bar to recovery." (Doc. No. 145, p. 2, emphasis in original.) Nina then devotes more than ten pages of her motion to demonstrating why the underlying conviction should be rendered void.

It is Nina who misunderstands the Court's ruling. Once again, Nina has attempted to raise a new argument at the post-summary judgment stage. Because this argument "could, and should have been made before [summary] judgment issued" it is improperly raised for the first time on reconsideration. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). *See e.g., Roger Miller Music, Inc. v. Sony/ATV Publ 'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007) ("Under Rule 59(e), parties cannot use a motion for reconsideration to raise new legal argument that could have been raised before a judgment was issued.")

Nina argues that she did raise this claim by moving for a new trial in the state criminal trial court approximately 50 days prior to the Court's

ruling on summary judgment,[5] She complains that:

> In fact, this court issued its judgment on March 22, 2007, without any notice or indication that it was preparing to make a ruling on the matter. Had the Court exercised due diligence and inquired into Nina Jackim's efforts for post-conviction relief, like it did repeatedly with Bruce Jackim, the [sic] Nina Jackim would have readily provided the relevant documentation and case law in support of her position prior to the issuance of the Order on March 22, 2007.

(Doc. No. 145, pp. 15-16.)

Nina and her counsel miss the point for at least two reasons. First, at this stage in these civil proceedings, the Court is unconcerned with Nina's untimely efforts to seek relief from the state criminal trial court. Its only consideration is whether the

argument she is raising post-summary judgment in this case could have or should have been brought at summary judgment. Because the details surrounding Nina's conviction were available to her at the summary judgment stage in these proceedings, any argument relating to the validity of the conviction should have been raised in opposition to summary judgment. Her failure to do so prevents her from arguing it at this point in

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[5] Nina Pled "no contest" to the charge of attempted disorderly conduct on February 23, 2004.

these proceedings. *See Sault Ste. Marie Tribe of Chippewa Indians*, 146 F.3d at 374; *Federal Deposit Ins. Corp. v. World University, Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (internal citation omitted) (Rule 59(e) motions are "aimed at reconsideration, not initial consideration" [...] Thus, parties should not use them to "raise arguments which could, and should, have been made before judgment issued.")

Furthermore, for the edification of both Nina and apparently also her counsel, the Court is compelled to note that it does not have a duty to inquire into other possible grounds a party may have for defending summary judgment.[6] *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-1480 (6th Cir. 1989) ("The trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact.") Rather, the non-moving party "has an affirmative duty to direct that court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Fulson v. Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992).

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It is Nina's failure to exercise due diligence and raise all arguments at summary judgment that precludes her from raising them here. *See Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988) (rejecting plaintiff's argument that the trial court should have examined the entire record

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[6] Nor does the Court have the duty of announcing its intention to rule on fully briefed motions that are at issue. It is up to the parties and their counsel to put all arguments they wish to raise before the Court in a timely fashion.

on summary judgment in the absence of plaintiff's efforts to point to portions of the record that supported its claims).

Even if Nina had raised her most recent argument relating to her underlying criminal conviction at the summary judgment stage, it still would have failed. As the Court explained in its November 2, 2007 decision, Nina may not use this § 1983 action to collaterally attack her state court conviction. The concern for finality and consistency, in addition to the "desire to avoid parallel litigation over the issues of probable cause and guilt" have led to a general aversion to expanding the opportunities to collaterally attack state court convictions. *See Heck*, 512 U.S. at 484-85. "The proper vehicle to challenge a conviction is through the state's appellate procedure and, if that fails, habeas relief under 28 U.S.C. § 2254." *Houston v. Buffa*, 2007 U.S. Dist. **LEXIS** 23532, '21 (E.D. Mich. Mar. 30, 2007).

Nina insists, however, that it is always permissible to collaterally attack a criminal conviction and cites a string of state law cases involving the right to post-conviction relief from a criminal trial court, or the vacation of a verdict by a civil trial court. (Doc. No. 145, p. 7.) Again, the argument misses the mark. The Court makes no determination as to the availability of post-conviction relief for Nina's state court criminal conviction. She is, of course, free to pursue these remedies in state court. She may not, however, use this federal civil rights action to collaterally attack that state court conviction. See *Heck*, 512 U.S. at 484-85; *Houston*, 2007 U.S. Dist. **LEXIS** 23532, '21.

Nor may she use these proceedings to accomplish what she no longer can do in state court due to the fact that she failed to take a direct appeal from her conviction.

B. Sam's Club is not a State Actor

In her motion to reconsider, Nina also challenges the Court's prior findings that Sam's Club is not a state actor. While her previous post-summary judgment motion focused upon the custody of the surveillance tape produced by Sam's Club, she now argues that "[t]he nexus in this case between Sam's Club and the City of Brooklyn has always been [the Sam's Club private security guard/Brooklyn police officer] Danny Meadows [...]." (Doc. No. 145, p. 20.) She argues that Officer Meadows had "the means, the motive, and the opportunity" to interfere with plaintiffs' civil rights. (*Id.*) She follows this observation up with two pages of nonsensical and unsupported conclusory allegations, which find no basis in the record, that she believes "should have been rephrased by the Court to aid in its analysis [...]."[7](*Id.*, pp. 21-23.)

This second round of attack upon the Court's finding that Sam's Club was not a state action fairs no better than the first because Nina still has not

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[7] For example, she poses the question "Was it proper or prudent to have the alleged victim of an alleged crime conduct the criminal investigation, where the individual is responsible for collecting evidence?" Similarly, she asks: "Is there an adverse inference if the aforementioned manager believes or has reason to believe that her actions have subjected the private entity to potential civil liability?" (*Id.*, p. 21.)

come forward with any evidence that the Brooklyn defendants conspired with Sam's Club. A private entity acts under color of state law when its conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937. The fact that Officer Meadows was employed by both Sam's Club and the City of Brooklyn, alone, does not establish that Sam's Club exercised any power reserved to the state. Moreover, Nina's conclusory allegations that she wishes the Court to accept add nothing to the analysis. Nina has failed

to offer any new evidence or controlling authority that alters the Court's determination that Sam's Club was not a state actor subject to liability under § 1983.

C. Defendants are not Required to File Complete Depositions[8]

According to Nina, "Federal Civil Rule 56(c) requires that a complete deposition transcript be submitted to the trial court." (Doc. No. 145, p. 17.) She also declares that "Federal Civil Rule 56 mandates that the trial court consider the entire record in deciding a motion for summary judgment." (*Id.*, p. 18.) She complains that defendants merely filed relevant excerpts from her deposition in support of summary judgment, and cites portions of her deposition that she believes should have been before the Court when it

[8] Plaintiffs also filed a separate motion to compel defendants to file the complete transcripts of plaintiffs Nina and Bruce Jackim. (Doc 146.) For reasons set forth in this Memorandum and Order, the Court **DENIES** the motion to compel.

considered the parties' summary judgment motions.

Once again, the Court reminds Nina and her counsel that the Court is under no duty to sift through entire depositions in search of evidence to defend summary judgment. *See Fulson*, 801 F. Supp. at 4. "Under Rule 56 of the Federal Rules of Civil Procedure, [Nina] as the non moving part[y has] the burden of designating 'specific facts showing that there is a genuine issue for trial.'" *Martin v. Maselle & Assocs.*, 2007 U.S. Dist. **LEXIS** 47931, *8 (S.D. Miss. July 2, 2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). In accordance with this Rule, the Court need only consider those portions of a deposition transcript "that have been specifically cited by [a party] when considering [] motions for summary judgment." *Id.* The Court is under no obligation to "peruse the entire transcripts in search of genuine issue of material fact that would

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preclude summary judgment." *Id.* Nina had a duty to identify those portions of the depositions that she believed would benefit her in her defense of defendants' summary judgment motions. She cannot excuse her failure to do so by shifting the blame to the Court or to defendants.

Nor does Rule 56 require, as Nina suggests, parties to file entire deposition transcripts in support of summary. Rule 56 merely requires the authentication of any documents used at summary judgment. Fed. R. Civ. P. 56(e)(1). Defendants complied with this requirement by submitting the title page, the relevant pages of the deposition, and

the court reporter's certification. Indeed, this Court's Case Management Plan and Trial Order (CMPTO) specifically directs parties to limit the submission of deposition transcripts on summary judgment to "that portion relevant to the issue in question and not more than two (2) pages in addition to establish context." While the Court observes that this litigation is still governed by the CMPTO issued by Judge O'Malley and the parties are not held to the requirements of this Court's standard CMPTO, it is clear that defendants have no duty at this stage in the litigation to file complete deposition transcripts.

D. Nina Jackim is Not Entitled to a Stay

In the alternative, Nina argues that the appeal from the denial of her

recently filed motion to vacate her state court conviction warrants a stay.[9] Nina has offered absolutely no support for the position that an appeal from an untimely motion to vacate a state court conviction should cause a federal court to stay proceedings while a civil rights plaintiff pursues tenuous post-conviction remedies.

Under *Heck*, in order to recover federal damages for injuries incurred in connection with an arrest, a § 1983 plaintiff must prove that "the

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[9] According to Nina, counsel made an oral motion to vacate her conviction on February 26, 2007 in the Parma Municipal Court. This motion was denied on March 9, 2007, and an appeal from that decision was taken on April 4, 2007 to the Eighth District Court of Appeals. (Doc. No. 145.)

conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-487. In *Wallace*, the Supreme Court observed that it may be prudent for district courts to stay civil rights proceedings when dismissal would otherwise be appropriate under *Heck* where a plaintiff's criminal case has not ended because his case is still on appeal. *Wallace*, 127 S. Ct. at 1098.

Indeed, the Court found it appropriate to stay this action with respect to Bruce Jackim's unreasonable seizure/wrongful arrest, excessive force and conspiracy claims pending resolution of his state criminal case. When Bruce filed this action, he was seeking a direct appeal from his state court convictions for assaulting a police officer and resisting arrest. Before summary judgment was decided, however, his direct appeal was resolved in his favor and he was awarded a new trial. While the reversal was not on the merits, the possibility of a retrial left open the possibility that Bruce may prevail at trial

or on appeal and no longer be barred by *Heck*. It was for this reason that the Court exercised its discretion and stayed this portion of the case. *See e.g., Boulden v. Froseth*, 2008 U.S. Dist. **LEXIS** 50638, *6-*8 (W.D. Wis. July 1, 2008) (§ 1983 action stayed pending outcome of direct appeal and habeas corpus on convictions for disorderly conduct

and resisting an officer); *McComas v. Davis*, 2007 U.S. Dist. **LEXIS** 15650, *7-*8 (S.D. Tex. Mar. 5, 2007) (temporary stay of one year implemented to allow for state court criminal trial on charges of stemming from § 1983 plaintiff's arrest).

Nina has not demonstrated that her conviction for attempted disorderly conduct has been reversed on direct appeal, expunged, or declared invalid by a state tribunal. Moreover, she does not dispute the fact that she failed to take a direct appeal from her conviction. As such, it stands as a bar to her excessive force and unreasonable seizure claims. *Heck*, 512 U.S. at 486-487. Though she has made a belated attempt to seek post-conviction relief, the Court finds that the likelihood of success of her post-conviction appeal from her untimely motion to vacate her sentence is too remote to convince the Court to exercise its discretion and issue her a stay.

E. Sanctions

As is clear from the discussion above, Nina's motion was not one of those rare motions that brought to the Court's attention an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Instead, the motion revamped old arguments, misstated relevant law, and merely expressed a general dissatisfaction with the Court's rulings on summary judgment and on the motion to alter or amend. Moreover, the tone of the motion was at times disrespectful to the Court and "treated, in effect, [the Court's] ruling and order as

though they were an opponent's brief, the rationale of which was subject to refutation, rather than, as a judicial order, acknowledgement." *Miller v. Norfolk S. Rwy. Co.*, 208 F. Supp. 2d 851,853 (N.D. Ohio 2002).

The motion was wholly without merit and should not have been filed. Nonetheless, because it was filed, it required a response from defendants and a ruling from this Court. Defendants were required to expend both time and money in filing an opposition brief, and the Court was forced to divert time away from its other matters to address this baseless motion.

Pursuant to Fed. R. Civ. P. 11(b), an attorney's signature on a pleading constitutes a representation that:

> (1) [the pleading] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law; [...].

Rule 11(c) provides that if the court "after notice and a reasonable opportunity to respond [...] determines that Rule 11(b) has been violated, [it] may [...] impose an appropriate sanction on any attorney, law firm, or party that has violated the rule or is responsible for the violation." Appropriate

sanctions may include monetary sanctions, attorneys' fees, or any other sanction sufficient to "deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11 (c)(4).

"Frivolous or legally unreasonable arguments [...] may incur penalty." *Berwick Grain Co. v. Illinois Dep't of Agric.*, 217 F.3d 502, 504 (7th Cir. 2000). With respect to motions for reconsideration, those motions which merely repeat or revive prior

arguments, without identifying anything material that a court previously overlooked, are frivolous. *Miller*, 208 F. Supp. 2d at 854. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986) (Rule 59(e) motion "frivolous because it introduced nothing new").

Without question, the present motion for reconsideration is frivolous. It accomplishes nothing more than to revive arguments that this Court, and Judge O'Malley before this Court, had already thoroughly addressed. As such, this certainly would be a situation where the imposition of monetary sanctions against Nina's counsel would be appropriate.

Nonetheless, the Court observes that it has yet to impose monetary sanctions upon an attorney for filing an unwarranted motion for reconsideration. In addition, too much time has already been expended in resolving baseless motions in this case. To invest further resources in a show cause hearing would only add insult to injury. Consequently, the Court has decided not to

schedule a show cause hearing which would permit the Court to sanction plaintiffs and/or their counsel (if appropriate), and, instead, it elects to strongly admonish Attorney Catherine Brady for wasting the Court's time with baseless filings. The Court believes that it has exercised considerable patience with Attorney Brady up to this point, but counsel is warned that the Court's patience is not without its limit. Should counsel continue to abuse the legal process, the Court will proceed according, up to and including, the issuance of sanctions such as fines and/or dismissal of the case.

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IV.
CONCLUSION

For all of the foregoing reasons, plaintiff Nina Jackim's motion for reconsideration (Doc. No. 145) is **DENIED**. Furthermore, Attorney Catherine Brady is hereby **ADMONISHED** for filing a frivolous motion.

IT IS SO ORDERED.

Dated: November 14, 2008

/s/ Sara Lioi
HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

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APPENDIX D